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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ARTURO SOLORZANO, Plaintiff and Appellant, v. CITY OF LYNWOOD, Defendant and Respondent.	B278913 (Los Angeles County Super. Ct. No. BC582180)

APPEAL from a judgment of the Superior Court of Los Angeles, Ruth A. Kwan, Judge. Affirmed.

Law Offices of Helena Sunny Wise and Helena Sunny Wise for Plaintiff and Appellant.

Leech Tishman Fuscaldo & Lampl, Inc., Philip A. Toomey, and Eric J. Wu for Defendant and Respondent.

Plaintiff Arturo Solorzano, an employee of defendant City of Lynwood, sued defendant for retaliating against him for activities protected under Labor Code section 1102.5 (whistleblower statute) and the Fair Employment and Housing Act (FEHA). Those activities included plaintiff's disclosing violations of defendant's business licensing requirements, complaining that these requirements were not uniformly enforced, and serving as a witness in the internal investigation of his coworker's discrimination charges. The trial court sustained defendant's demurrer to plaintiff's fourth amended complaint without leave to amend.

We conclude plaintiff failed to state a timely, cognizable whistleblower cause of action because either the claims of retaliatory conduct underlying that cause of action are time-barred or plaintiff has failed to plead an adverse employment action or causation adequately. Regarding his FEHA cause of action, we conclude plaintiff failed to state sufficient facts that his participation in the investigation of his coworker's disability discrimination charges caused defendant to retaliate against him or resulted in an adverse employment action. Finally, we conclude the trial court did not abuse its discretion in not granting plaintiff leave to amend because plaintiff has not properly identified additional facts, if any, that could cure these defects after plaintiff filed several iterations of his complaint.

Accordingly, we affirm.

FACTUAL BACKGROUND

We set forth below the background facts alleged in plaintiff's fourth amended complaint. We describe in our discussion section the facts specific to the issues analyzed in that section.

Plaintiff worked as a business license specialist for defendant. In that role, plaintiff was responsible for ensuring that local businesses complied with defendant's business licensing laws. He frequently discussed his findings with defendant's business licensing division manager, Jonathan Colin. Several businesses in City Councilmember Maria Santillan's district complained to plaintiff that defendant had given preferential treatment to other businesses in that district. Plaintiff then transmitted those complaints to his coworkers and Colin.

Colin and Santillan were romantically involved and met frequently in Colin's office. Santillan and Rita Manibusan, who was "in charge of Code Enforcement," were childhood friends, and Manibusan contributed to Santillan's political campaigns. Director of Redevelopment Services Sarah Withers pressured plaintiff to amend his grant deed to his home in connection with the Lynwood Redevelopment Agency's Redwood Project in what plaintiff believed to be an attempt to extort money from him.

Subsequently, while performing a routine inspection, plaintiff discovered that a commercial truck repair business, F-Trucking, was operating illegally, and reported his discovery to his supervisors and coworkers. Plaintiff also discovered that a dental office had failed to grade its land, which discovery plaintiff also reported.

Plaintiff "protested" that defendant failed to enforce applicable laws to Clerk Maria Quinonez, City Manager Roger Haley, Interim City Manager Richard Warne, and Human Resources Directors Alfredo Lopez, Robert Blackwood, and Haydee Sainz. Plaintiff further spoke out about that issue in "Community forums" around the time of the November 2013

election. Later, F-Trucking employees threatened plaintiff at Colin's and Manibusan's urging.

Plaintiff also participated as a witness in defendant's internal investigation of the disability discrimination claims brought by plaintiff's colleague, Cynthia Foreman (the Foreman investigation). Specifically, plaintiff gave testimony that corroborated Foreman's claims to investigators whom defendant had hired to conduct that investigation. Additionally, plaintiff complained that Manibusan mocked his accent, and that two African-American coworkers experienced race discrimination.

Santillan, Manibusan, Withers (who had become an acting city manager), City Manager Arnoldo Beltran, and others conspired to retaliate against plaintiff because of his whistleblowing activities and participation in the Foreman investigation.

Plaintiff alleges defendant retaliated against him when it: (1) deprived him of overtime, promotional opportunities, vacation accrual, an alternate work schedule, training, out-of-class pay, and his "request for confidentiality" concerning his vehicle; (2) required plaintiff to undergo unnecessary training; (3) investigated false charges against plaintiff concerning his conduct regarding the El Pollo Body Shop, and later revived that investigation; (4) placed him on paid administrative leave pending the renewed investigation; (5) improperly reviewed plaintiff's personnel file; (6) solicited allegations of misconduct against plaintiff; (7) issued (and later rescinded) layoff notices; (8) eliminated plaintiff's position; and (9) consolidated plaintiff's department with two other departments. Because of that consolidation, defendant moved plaintiff to the code enforcement

department, but did not provide him with code enforcement training.

Plaintiff filed (1) an administrative complaint with the Department of Fair Employment and Housing (DFEH) for retaliation based on his participation in the Foreman investigation, (2) a government claim based on his whistleblowing activities, and (3) a grievance seeking out-of-classification pay for having performed senior business license specialist duties, which grievance Beltran denied.

PROCEDURAL BACKGROUND

In his initial complaint, filed on May 18, 2015, plaintiff sued defendant, Santillan, and Manibusan for (1) whistleblower retaliation (Lab. Code, § 1102.5), (2) retaliation under FEHA (Gov. Code, § 12940), and (3) federal civil rights violations (42 U.S.C. § 1983). Defendant and Santillan removed the action to federal court, which dismissed the federal civil rights cause of action and remanded the remaining claims to the superior court.

Several demurrers and amendments ensued in superior court, culminating in the operative fourth amended complaint. In that complaint, plaintiff asserted his two retaliation claims against defendant only. The superior court sustained defendant's demurrer to that complaint without leave to amend, declined to rule on defendant's then pending summary judgment motion as moot, and entered a judgment of dismissal. Specifically, the trial court ruled as to plaintiff's claims of retaliation that they were either time-barred or lacked sufficient allegations of an adverse employment action, or that his activities caused any

purported adverse employment action. Plaintiff timely appealed that judgment.[1]

STANDARD OF REVIEW

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162 (*T.H.*).) We "adopt[ ] a liberal construction of the pleading and draw[ ] all reasonable inferences in favor of the asserted claims." (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1143.) "[W]e accept as true all properly pleaded facts." (*T.H.*, *supra*, 4 Cal.5th at p. 156.) "[W]e are not[, however,] required to accept the truth of [the pleading's] legal conclusions." (*Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1257.) Additionally, "[t]he limited and statutory nature of governmental liability mandates that claims against public entities be

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[1] Plaintiff also seeks to appeal the trial court's decision not to rule on defendant's summary judgment motion. Because that decision was not part of the final judgment that terminated the action, it is not appealable. (See *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.)

Additionally, we note that on June 11, 2018, we granted defendant's motion for judicial notice of the unpublished opinion in *Foreman v. City of Lynwood* (Mar. 19, 2018, B278912) [nonpub. opn.] in which our colleagues in Division Five affirmed a judgment dismissing Foreman's retaliation claims brought under the whistleblower statute and FEHA, and her other FEHA claims, following the trial court's sustaining defendant's demurrer to her second amended complaint without leave to amend.

specifically pleaded." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439.)[2]

We review the trial court's denial of leave to amend a defective pleading for abuse of discretion. (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 846.) "If the complaint does not state facts sufficient to constitute a cause of action, the appellate court must determine whether there is a reasonable possibility that the defect can be cured by amendment." (*Id.* at p. 847.)

DISCUSSION

A. Plaintiff's Whistleblower Claim Fails Because He Does Not Allege Adequately A Timely, Cognizable Adverse Employment Action or Causation

To state a prima facie case of whistleblower retaliation under Labor Code section 1102.5, subdivision (b),[3] " 'a plaintiff

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[2] Plaintiff contends he need only set forth the essential facts with reasonable precision. The case plaintiff cites addresses uncertainty and does not obviate the specific pleading requirement. (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245.)

[3] Plaintiff does not specify the subdivision of Labor Code section 1102.5 under which he brought this lawsuit. We infer plaintiff is relying on subdivision (b) because that subdivision precludes an employer from retaliating for disclosing a legal violation, which is plaintiff's claim here. Subdivision (b) provides: "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the

must show (1) . . . engage[ment] in a protected activity, (2) [the plaintiff's] employer subjected [the plaintiff] to an adverse employment action, and (3) there is a causal link between the two.' " (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138 (*Mokler*).)

An adverse employment action is an employer's conduct "that materially affects the terms, conditions, or privileges of employment." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051 (*Yanowitz*).) "Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment. [Citation.] But the terms or conditions of employment 'must be interpreted liberally and with a reasonable appreciation of the realities of the workplace [to further the fundamental anti[retaliation] purposes of the [whistleblower statute]].' " (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 (*Patten*).)

The requisite " ' "causal link may be established by an inference derived from circumstantial evidence, 'such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action

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employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Lab. Code, § 1102.5, subd. (b).)

and allegedly retaliatory employment decision.' " [Citation.]' [Citation.] 'Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.' " (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69-70 (*Morgan*).)

1. All plaintiff's claims of retaliation occurring before January 24, 2014 are time-barred

Plaintiff does not dispute that because defendant is a public entity, he was required to present a government claim no later than six months after the accrual of his whistleblower retaliation cause of action for his claim to be timely. (Gov. Code, § 911.2, subd. (a) [six-month limit for cause of action for death or for injury to person or personal property, one year for all other claims]; *Moore v. Twomey* (2004) 120 Cal.App.4th 910, 913 [specific statute of limitations provided in Government Code governs lawsuit against public entity]; *Collins v. County of Los Angeles* (1966) 241 Cal.App.2d 451, 460 [strict compliance required]; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1320 (*Colores*) [government claim filed on January 5, 1999 timely where cause of action accrued after July 5, 1998, in particular, on November 20, 1998]; cf. *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 754–755 [whistleblower claim not for personal injury for purposes other than statute of limitations].) A whistleblower cause of action accrues at the time of the adverse employment action. (See, e.g., *Colores*, at p. 1320 [cause of action accrued when employment terminated].)

As alleged in the fourth amended complaint, the following purported adverse employment actions occurred before January 24, 2014: (1) The city attorney and director of redevelopment services pressured plaintiff to tender and amend

the grant deed to his home and pay $100,000 to the Lynwood Redevelopment Agency, which plaintiff viewed as extortion (2006 and January 2010); (2) a source whom plaintiff does not identify tendered a complaint accusing plaintiff of misconduct concerning an auto body shop's fraud, and an investigation ensued (complaint tendered February 26, 2010, investigation concluded August 26, 2010 or February 2011);[4] (3) Santillan, Colin, and Manibusan caused plaintiff to be threatened with demotion and increased scrutiny (fall 2010); (4) defendant denied plaintiff code enforcement training the first of two times[5] (October 2010); (5) Colin sought to reduce plaintiff's pay and to impose mandatory performance reviews (October 26, 2010); (6) defendant required plaintiff to take an ethics class (spring 2011); (7) Manibusan and Colin refused to allow plaintiff to work overtime (starting March 2011 through July 2012); (8) city representatives urged F-Trucking to threaten plaintiff physically (fall 2012); (9) Colin and Manibusan refused plaintiff's requests to work an alternate work schedule (July 2012); (10) defendant did not allow plaintiff to accrue vacation time or cash out his excess vacation time that exceeded the cap on accrued vacation time, causing plaintiff to lose that accrued time

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[4] Plaintiff alleges these two inconsistent dates on which the investigation concluded. Defendant did not argue below that inconsistency renders the complaint uncertain, thus forfeiting that argument. (Code Civ. Proc., §§ 430.10, subd. (f), 430.80, subd. (a); *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 103.) Nevertheless, both dates fall outside the statute of limitations.

[5] We describe the second occasion defendant allegedly denied plaintiff training in subsection A(2)(g), *post*.

(fall 2011 through January 2013); (11) Colin and Manibusan urged F-Trucking to accuse plaintiff falsely of misconduct (around February 20, 2013); (12) Santillan and Manibusan accessed plaintiff 's personnel file (January 12, 2014); (13) at Santillan and Manibusan's urging, defendant renewed an investigation of allegations of misconduct against plaintiff (January 14, 2014); (14) defendant placed plaintiff on administrative leave for more than one month, pending the renewed investigation (January 14, 2014); and (15) defendant did not "post" the position of senior business license specialist, thus denying plaintiff the ability to compete for a promotion to that position (January 14, 2014).

Plaintiff presented his government claim on July 24, 2014. Thus, the adverse employment actions he alleges that occurred before January 24, 2014 would be time-barred on their face. Plaintiff argues that the continuing violation doctrine resuscitates these claims.[6] (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 (*Jumaane*).) We disagree.

For the continuing violation doctrine to apply, an employee must prove that the otherwise untimely adverse action was "(1) similar or related to the conduct that occurred within the limitations period [here between January 24, 2014 and July 24, 2014]; (2) the conduct was reasonably frequent; and (3) the conduct had not yet become permanent." (*Jumaane*, *supra*, 241 Cal.App.4th at p. 1402.)

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[6] Plaintiff asserts that equitable tolling and the cat's paw doctrine are alternative theories that rescue his claims from being time-barred. As discussed *post*, neither theory aids plaintiff.

In connection with this analysis, "a temporally related and continuous course of conduct" may constitute an adverse employment action. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1058.) Nevertheless, in the context of an ongoing proceeding, " 'permanence' properly should be understood to mean 'that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation . . . will be futile.' " (*Id.* at p. 1059, fn. 19, citing *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.)

For example, in *Yanowitz*, the plaintiff refused to follow a discriminatory directive in fall 1997. Then, in April, May, June, and July 1998, the defendant employer solicited negative feedback from the plaintiff's subordinates, continued to refuse those subordinates' administrative needs, engaged in unfounded criticism and humiliation of the plaintiff in those subordinates' presence, issued a false negative written evaluation to the plaintiff, and refused the plaintiff time to respond to that evaluation. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1059.) By consistently criticizing the plaintiff's performance every month for four consecutive months, the defendant employer committed a continuing violation.

Here, unlike in *Yanowitz*, plaintiff alleges numerous incidents predating January 24, 2014 and fails to allege how these incidents are related to conduct that occurred during the limitations period or why they did not achieve permanence before that period even commenced. Plaintiff asserts that the alleged facts "show[ ] a remarkable similarity" and constitute "continuous harassment," but provides no explanation or citation to particular allegations. (See *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287 ["[W]e may disregard conclusory

arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt."].)

The crux of plaintiff 's assumption that the aforementioned actions were continuous or related is based on his "belie[f] that a conspiracy was formed several years ago" "to destroy" him. Plaintiff 's mere belief is insufficient to establish a continuous pattern of adverse actions. (See *Yanowitz*, *supra*, 36 Cal.4th at p. 1046 ["Standing alone, an employee's unarticulated belief . . . will not suffice . . . for the purposes of establishing a prima facie case of retaliation"].) Plaintiff does not allege facts suggesting the alleged retaliators formed a plan to "destroy" him even though facts regarding forming a plan are essential to state a conspiracy. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511 (*Applied Equipment*).) Additionally, plaintiff 's allegation that Santillan was "closely aligned" with Beltran is conclusory and does not support his conspiracy theory.

Plaintiff asserts the "cat's paw" theory makes the continuing violation doctrine applicable but does not explain that theory's relevance to the statute of limitations. Indeed, the cat's paw doctrine merely allows an inference of retaliatory animus where a significant participant in an employment decision has exhibited such animus. (See *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1188 (*Husman*).)

Plaintiff argues he "has also alleged that leading up to the filing of his Tort Claim and DFEH Charges, internal efforts were resorted to, to avoid the necessity for a lawsuit." Plaintiff then argues equitable tolling preserves otherwise time-barred claims. Plaintiff provides no citation to these purported allegations or

analysis of how any such allegations support application of the equitable tolling doctrine. He cites a case (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 108) involving FEHA's administrative exhaustion requirement. Plaintiff does not apply that case to any alleged facts or explain why it is applicable to an analysis of the statute of limitations on his whistleblower claim, which is governed by the Government Code. To the extent he may be basing his equitable tolling argument on Foreman's grievance proceeding, the doctrine would apply, if at all, to rescue Foreman's claims but not plaintiff's causes of action.

In sum, plaintiff's claims based on conduct predating January 24, 2014 are time-barred.[7]

2. Plaintiff failed to allege sufficiently an adverse employment action or causation as to the remaining alleged acts of retaliation for his whistleblowing

Plaintiff alleges the following adverse actions postdating the filing of his government claim on July 24, 2014: (1) Withers embarrassed and degraded plaintiff (July 29, 2014); (2) defendant threatened plaintiff's employment (since July 24, 2014); (3) Beltran "interrogated [plaintiff] concerning [plaintiff's] work experience and Business License practices existing in the City of

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[7] Plaintiff also alleges that "[b]etween January 2014 and June 17, 2014," defendant failed to post a senior business license specialist position thus preventing him from applying for that promotion. We discuss why that allegation does not state an adverse employment action or any causal link to plaintiff's whistleblowing in section B, *post*.

Lynwood" (December 8, 2014); (4) Beltran denied plaintiff out-of-classification pay (December 18, 2014); (5) defendant issued plaintiff a layoff notice following a motion by Santillan to consolidate the business license and code enforcement departments (May 26 and 28, 2015); (6) defendant did not allow plaintiff to apply for a promotion to the public safety manager position; (7) "Beltran and his colleagues" denied plaintiff code enforcement training (sometime after May 28, 2015);[8] (8) defendant solicited accusations of misconduct against plaintiff from an ice cream vendor and investigated plaintiff for embezzlement (March 2016); and (9) defendant refused plaintiff's "request for confidentiality" ("recently").[9]

For the reasons detailed below, these allegations do not state a claim of retaliation because plaintiff fails to plead with the required particularity that those actions (1) materially affected the terms, conditions, or privileges of his employment, or (2) resulted from his alleged whistleblowing activity. (See (*Patten*, *supra*, 134 Cal.App.4th at p. 1387.)

a. Withers embarrassed and degraded plaintiff

Plaintiff states Withers "openly embarrassed and degraded [his] skills and abilities" at a July 29, 2014 meeting with plaintiff and sheriff's department representatives. He further states that

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[8] Plaintiff states this action occurred "periodically ever since the Business License Division was eliminated in May 2015."

[9] We observe that plaintiff did not file a government claim related to these claims. On appeal and below, the parties do not raise the failure to exhaust this administrative remedy. Thus, the issue is forfeited. (*Mokler*, *supra*, 157 Cal.App.4th at p. 136.)

conduct "tarnished [his] good name," thus causing him physical and emotional distress.

Plaintiff does not allege how Withers embarrassed and degraded him or what she said, if anything, to do so. Plaintiff avers no facts suggesting Withers continued to bear animus toward him for his refusal to amend his grant deed in 2006 and January 2010, which refusal is the alleged basis for her animus. The four-year temporal gap between plaintiff's latest refusal to amend his grant deed, and Withers' embarrassing and degrading him is too great to support an inference of causation. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 478 (*Flait*).)

b. Defendant threatened plaintiff's employment

Plaintiff alleges in conclusory fashion that defendant threatened his employment since he filed his government claim on July 24, 2014. Plaintiff does not identify any threat to his employment. We acknowledge plaintiff alleges Beltran "interrogated [plaintiff] concerning [plaintiff's] work experience and Business License practices existing in the City of Lynwood" and denied plaintiff out-of-classification pay. Plaintiff does not explain how these actions constituted threats to his employment. Plaintiff also omitted the " 'essential' " allegation that Beltran knew of plaintiff's government claim. (*Morgan*, *supra*, 88 Cal.App.4th at p. 70.)

c. Beltran "interrogated" and intimidated plaintiff

As set forth above, plaintiff alleges that on December 8, 2014, Beltran "interrogated" him. Plaintiff does not cite what,

if anything, Beltran said or did that constitutes an "interrogation." As noted above, he has not alleged any facts supplying a causal connection between this "interrogation" and any protected activity.

d. Beltran denied plaintiff out-of-classification pay

Plaintiff alleges that on December 18, 2014, Beltran denied plaintiff's "Grievance seeking out-of-classification pay for having performed the work of a Senior Business License Specialist." Plaintiff also alleges that in summer 2013, the city council "publicly noted that [plaintiff] had been functioning in said capacity without benefit of additional remuneration for years." These allegations are insufficient because plaintiff does not allege that he was entitled by law, policy, or any other authority to such pay, who made these notations in 2013, or whether Beltran was even aware of the notations given that plaintiff alleges Beltran had not "joined the City of Lynwood" until October 21, 2014.

e. Defendant issued plaintiff a layoff notice

On May 26, 2015, Santillan introduced a motion to issue layoff notices and eliminate the business license specialist position, which position plaintiff then held. The city council passed that motion two days later, and plaintiff received a layoff notice. Plaintiff, however, does not allege that Santillan knew of his alleged whistleblowing or that she had expressed animus because of plaintiff's whistleblowing. We observe that animus cannot simply be inferred based on temporal proximity because the last time plaintiff complained about a code violation was in early December 2013, which date is over a year before plaintiff received the layoff notice. (*Flait*, *supra*, 3 Cal.App.4th at p. 478.)

Additionally, plaintiff made that complaint to Interim City Manager Warne, but plaintiff does not allege Warne communicated the complaint to Santillan. Although plaintiff spoke out at "Community forums" around the November 2013 election, he does not allege Santillan was present at those forums or knew of plaintiff's activities there. Further, as set forth above, plaintiff states insufficient facts of a conspiracy involving Santillan. Thus, plaintiff does not allege a connection between his whistleblowing and the layoff notice.

f. Defendant did not allow plaintiff to apply for the public safety manager position

Plaintiff alleges defendant refused to permit him to bid competitively for the public safety manager position. Plaintiff fails to allege how defendant did so, who was involved in that decision, whether anyone involved in that decision knew of his alleged whistleblowing, or that he was qualified for the position. (See, e.g., *Morgan*, *supra*, 88 Cal.App.4th at p. 73 [retaliatory motive lacking where plaintiff failed to demonstrate qualifications for particular jobs]; *Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 216 (*Addy*) [no prima facie case of failure to promote based on discrimination where plaintiff failed to show she was qualified for position].) Plaintiff also does not allege, as a threshold matter, that there ever was a "competitive bidding" process for that position.

g. Beltran and his colleagues denied plaintiff code enforcement training and required plaintiff to complete unnecessary "Penal Code 832 training"

Plaintiff claims that in March 2016,[10] Beltran improperly scheduled him for "Penal Code 832 training" knowing that plaintiff was already "Post-certified." The temporal gap between this event (March 2016) and the final instance of plaintiff's alleged whistleblowing (December 2013) is too great to support an inference that Beltran's scheduling of these trainings was the product of plaintiff's whistleblowing activities. (*Flait*, *supra*, 3 Cal.App.4th at p. 478.)

Plaintiff alleges that Beltran and his colleagues did not let him take code enforcement training but offered that training to non-complaining employees. He does not allege with particularity when or which colleagues denied him that training. He does not allege he ever requested the training, defendant ever promised him the training, or that the training was scheduled or otherwise available around the time plaintiff desired it. (See, e.g., *Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 93 [denial of promised training may be adverse action depending on circumstances].) Finally, plaintiff does not allege any consequence resulting from the lack of training other than stating his conclusion that it "adversely affect[s] his skills and abilities." Plaintiff's conclusory

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[10] Specifically, plaintiff alleges that "[m]eanwhile," when defendant was soliciting accusations of misconduct against plaintiff from an ice cream vendor in March 2016, Beltran scheduled the training.

allegations are simply devoid of any connection between protected activity and a cognizable adverse employment action.

h. Defendant solicited accusations of misconduct against plaintiff from ice cream vendors

Plaintiff alleges that starting in March 2016, Santillan and another councilmember "conspired with commercial proprietors, vendors and residents alike to bolster false accusations" of embezzlement against him. As set forth earlier, plaintiff's conspiracy allegations are deficient because he alleges no facts that establish the formation of a plan. (See *Applied Equipment*, *supra*, 7 Cal.4th at p. 511.) Plaintiff also avers defendant solicited accusations from ice cream vendors in particular but does not identify anyone who prompted or engaged in that solicitation. Plaintiff does not state facts suggesting anyone involved with these solicitations continued to harbor animus toward him for whistleblowing. The lack of temporal proximity between the solicitations occurring in March 2016, and the date plaintiff last complained about violations of law in early December 2013 would not allow such an inference. (*Flait*, *supra*, 3 Cal.App.4th at p. 478.)

i. Defendant refused plaintiff's "request for confidentiality"

Plaintiff alleges no basis for his being "entitled to maintain confidentiality of his home address in connection with his DMV-issued license plate." Plaintiff's conclusory allegation that defendant's denial of his "request for confidentiality for a used vehicle [he had] recently purchased" "aggravat[ed defendant's] actions" and compromised plaintiff's and his family's emotional

wellbeing is insufficient to state an adverse employment action or any causal connection to plaintiff's whistleblowing activities.

In sum, as to actions postdating the limitations period, plaintiff has not sufficiently alleged an adverse employment action caused by his whistleblowing conduct.

B. Plaintiff's FEHA Cause Of Action Fails Because He Does Not Allege His Participation In The Foreman Investigation Caused An Adverse Employment Action

To establish a prima facie claim of retaliation under FEHA, plaintiff must show: (1) he engaged in a protected activity; (2) he was subjected to an adverse employment action; and (3) there is a causal link between the protected activity and adverse employment action. (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1252.)

Protected activities under FEHA include opposing "any practices forbidden under [FEHA]" and testifying or assisting "in any proceeding under [FEHA]." (Gov. Code, § 12940, subd. (h).) Thus, the essential difference between whistleblower retaliation and retaliation under FEHA is, under FEHA, protected activities are limited to opposing or complaining about discrimination or harassment against an employee based on the employee's protected status, such as race and physical or cognitive disability. (*Id.*, subd. (a).) Otherwise, the standards for adverse employment actions and causation are essentially the same. (See *Patten*, *supra*, 134 Cal.App.4th at p. 1388 [applying *Yanowitz*, *supra*, 36 Cal.4th 1028 to Labor Code section 1102.5, subdivision (b)].)

1. Plaintiff's allegations of protected activities under FEHA

Plaintiff alleges that, starting in August 2013 "and thereafter for the next several months," he reported Manibusan and Colin were discriminating against and harassing Foreman based on Foreman's disability. Specifically, he alleges he reported to Human Resources Directors Blackwood and Sainz that Foreman was receiving different treatment regarding overtime, promotional opportunities, and area assignments. On December 6, 2013, Foreman identified plaintiff to outside investigator Donna Evans as a witness of that purported differential treatment. From fall 2013 through April 2014, plaintiff gave testimony corroborating Foreman's claims to Sainz, Warne, Evans, and Evans' assistants. Sometime after April 2014, plaintiff met with two investigators of an outside investigation firm to whom he also corroborated Foreman's claims. Significantly, plaintiff does not allege Manibusan or Colin knew of plaintiff's participation in the Foreman investigation.

Defendant does not dispute that these facts describe protected activity.[11]

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[11] Plaintiff avers that Manibusan mocked his accent in 2010 and that he complained about "discriminatory conduct" and "discriminatory treatment" of two African-American coworkers, Winbush and Spears. He does not allege the dates of the "discriminatory treatment." These allegations are too vague to support a FEHA retaliation claim. (See *Yanowitz*, *supra*, 36 Cal.4th at p. 1047 [mere complaint of " 'ethnocism' " too vague to constitute protected activity].)

2. Plaintiff fails to state sufficient facts that could establish causation or an adverse employment action in connection with his participation in the Foreman investigation

Plaintiff alleges the following four adverse employment actions by defendant regarding his participation in the Foreman investigation: (1) placing him on administrative leave in January 2014; (2) issuing a layoff notice; (3) depriving him of promotional opportunities; and (4) depriving him of overtime opportunities.

a. Reopening investigation into allegations of misconduct against plaintiff and placement on administrative leave

Plaintiff alleges that, in or about March 2010, defendant began investigating allegations of misconduct against him concerning the El Pollo Body Shop. That investigation concluded in February 2011. In January 2014, defendant reopened that investigation and placed plaintiff on paid administrative leave pending the renewed investigation. Defendant closed that investigation and cleared plaintiff of those charges in March 2014.

Plaintiff alleges a mere conclusion, to wit, the renewed investigation was retaliation for his participation in the Foreman investigation. He, however, alleges in support of this conclusion that Santillan and Manibusan manufactured false allegations against him to prompt the investigation's renewal because they were upset with him for reporting their mishandling of certain licensing fees. Thus, plaintiff attributes the investigation's renewal and administrative leave placement to his reporting

business licensing violations, not to the Foreman investigation, and fails to allege facts supporting an inference that defendant's renewing the investigation against him was the product of his support of Foreman's claims.

b. Issuing layoff notices

Plaintiff alleges that defendant issued a layoff notice to him on May 28, 2015. He fails to link that notice causally to his participation in the Foreman investigation. He does not allege facts supporting an inference that defendant singled him out for a layoff. The 13-month temporal gap between the latest date of plaintiff's participation in the Foreman investigation (April 2014) and issuance of the layoff notices (May 2015) is too remote to warrant an inference of causation. (*Flait*, *supra*, 3 Cal.App.4th at p. 478.)

Finally, plaintiff states that one of his alleged retaliators, Santillan, introduced the motion to authorize the layoff notices to the city council, but he does not state the " 'essential' " allegation that Santillan knew of his participation in the Foreman investigation when she did so. (*Morgan*, *supra*, 88 Cal.App.4th at p. 70.) Thus, we fail to discern how the layoff notice constitutes actionable conduct.

c. Being deprived of promotional opportunities for senior business license specialist and public safety manager

Plaintiff alleges that between January 2014 and June 17, 2014, defendant failed to post the senior business license specialist position "thus preventing [plaintiff] from applying." Plaintiff fails to allege a causal link between this claim and his participation in the Foreman investigation.

There also is no allegation that anyone involved with the alleged postings or promotion decisions knew of plaintiff's participation in the Foreman investigation. (Cf. *Husman*, *supra*, 12 Cal.App.5th at p. 1188 [cat's paw theory allows inference of causation where significant participant in employment decision exhibited animus].)

That plaintiff alleges the person in charge of the promotion to senior business license specialist, Withers, wanted to put her boyfriend into that position, does not supply facts to support a conclusion that plaintiff's participation in the Foreman investigation motivated defendant's decision to "delete" or not "post" the position.

Finally, plaintiff fails to allege he was qualified for senior business license specialist or public safety manager. (See, e.g., *Morgan*, *supra*, 88 Cal.App.4th at p. 73 [retaliatory motive lacking where plaintiff failed to demonstrate qualifications for particular jobs]; *Addy*, *supra*, 44 Cal.App.4th at p. 216 [no prima facie case of failure to promote based on discrimination where plaintiff failed to show she was qualified for position].)

Plaintiff argues with no citation to the fourth amended complaint, that he was "slated for" promotion to senior business license specialist but does not allege any supporting facts beyond his conclusory opinion. Similarly, again with no citation to the fourth amended complaint, the argument that defendant had budgeted for the position does not provide the missing causal link. Plaintiff's allegation that defendant " 'deleted' " the senior business license position is uncognizable as well because plaintiff also alleges defendant did not "post" the position: Defendant cannot delete a position that was not posted.

To the extent plaintiff alleges "the council publicly noted that [plaintiff] had been functioning" as a senior business license specialist, plaintiff alleges no facts suggesting "the council" was involved in the promotion decision. (Capitalization omitted.) Additionally, by failing to identify the councilmember who made the aforementioned note, the allegation about that note is insufficient to plead causation.

d. Being deprived of overtime opportunities

Plaintiff alleges that from March 2011 through July 2012, Manibusan and Colin refused to allow plaintiff to work overtime. The lost overtime opportunities logically lack causation because plaintiff's participation in the Foreman investigation postdates these purported denials of overtime opportunities. (*Morgan*, *supra*, 88 Cal.App.4th at p. 69 [plaintiff must show protected activity and " ' "thereafter" ' " adverse employment action].) Specifically, the lost overtime opportunities occurred "[s]hortly after . . . March 2011" and "up through July 2012," and plaintiff first reported Foreman's disability discrimination charges in August 2013.

C. Plaintiff Does Not Demonstrate A Possibility Of Curative Amendment

In broadly asserting that "a causal nexus . . . is apparent," plaintiff cites the entire volume of evidence he submitted below in opposition to defendant's summary judgment motion generally, without specifying any page, line, or paragraphs numbers. (Capitalization omitted.) Plaintiff also claims that Sainz's declaration and deposition testimony conflict, thus "showing the existence of triable issues of fact." Plaintiff, however, provides no explanation or specific citations to that evidence.

Plaintiff's assertions and record citations are insufficient to establish error because plaintiff "has the burden to prove [error] by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.) " 'The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.' " (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

To the extent plaintiff proffers more specific record citations, explanations, or theories in his reply, those proffers are too late. (*Hurley v. Department of Parks & Recreation* (2018) 20 Cal.App.5th 634, 648 [" ' "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." ' "]

The trial court gave plaintiff multiple opportunities to correct the deficiencies in his pleading to no avail. We conclude the trial court did not abuse its discretion in sustaining defendant's demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.